INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	12
Conclusion	22

CITATIONS

Cases:

American News Co. v. *Federal Trade Commission*, 300 F. 2d 102 certiorari denied, 371 U.S. 824	18
Elizabeth Arden, Inc. v. *Federal Trade Commission*, 156 F. 2d 132, certiorari denied, 331 U.S. 806	18
The Atlantic Refining Company v. *Federal Trade Commission*, 344 F. 2d 699, certiorari denied, 382 U.S. 939	23
Champion Spark Plug Co., 50 F.T.C. 30	17
Dentists' Supply Co., 37 F.T.C. 345	17
E. Edelmann & Co. v. *Federal Trade Commission*, 239 F. 2d 152 (affirming 51 F.T.C. 978), certiorari denied, 355 U.S. 941	13, 17
Federal Trade Commission v. *Henry Broch & Co.*, 363 U.S. 166	21
Federal Trade Commission v. *Mandel Brothers, Inc.*, 359 U.S. 385	18
Federal Trade Commission v. *Morton Salt Co.*, 334 U.S. 37	14

224-713—66—1

Cases—Continued

	Page
Flotill Products, Inc. v. *Federal Trade Commission*, 358 F. 2d 224	23
General Motors Corp., 50 F.T.C. 54	17
K. S. Corp. v. *Chemstrand Corp.*, 198 F. Supp. 310	18
Kraft-Phenix Cheese Corporation, 25 F.T.C. 537	17
Emile M. Lapeyre, et al. (C.A. 5, No. 21,787, argued April 19, 1966)	23
Lurid Brothers and Company, Inc. (C.A. 3 No. 14,402 and 14 related cases, argued January 21, 1966)	23
Luxor, Ltd., 31 F.T.C. 658	17
Monroe Auto Equipment Company v. *Federal Trade Commission*, 347 F. 2d 401, certiorari denied, 382 U.S. 1009	18
Thomasville Chair Company v. *Federal Trade Commission*, 306 F. 2d 541	21
Whitaker Cable Corp. v. *Federal Trade Commission*, 239 F. 2d 253, certiorari denied, 353 U.S. 938	13
Statutes:	
Clayton Act, Section 2, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13:	
Sec. 2(a)	2, 3, 10, 12, 14, 16, 19, 21
Sec. 2(c)	21
Miscellaneous:	
16 C.F.R. 1.7	23

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 61

PUROLATOR PRODUCTS, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Petition, Appendix B, 2a–22a) is reported at 352 F. 2d 847. The opinion and order of the Federal Trade Commission (R. 38–72) [1] and the dissenting opinion of Commissioner Elman (R. 73–77) have not been officially reported.

JURISDICTION

The order of the court of appeals affirming the Commission's order was entered on October 22, 1965 (Petition, Appendix C, 23a), and the final decree enforcing that order was entered on November 15, 1965 (Petition, Appendix D, 24a–25a). The petition

[1] "R." refers to the printed joint appendix filed in the court of appeals.

for a writ of certiorari was filed on January 19, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the costs of internal redistribution from the central warehouse of a purchasing warehouse distributor to its branch warehouses can negate a *prima facie* showing of injury to competition in a price discrimination case.

2. Whether substantial evidence supports the Commission's finding that jobbers, who are the customers of warehouse distributors, are for purposes of Section 2(a) of the Clayton Act "indirect purchasers" from Purolator.

3. Whether petitioner's discriminatory prices can be cost justified by the differences in price petitioner elects to charge rather than by the "differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities" in which petitioner's filters are "sold or delivered."

STATUTE INVOLVED

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a), provides in pertinent part:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce * * * and

where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *.

STATEMENT

Purolator Products, Inc. ("Purolator") manufactures and sells filters, including automobile filters for the replacement market (R. 98-99). In 1957 its sales in this market exceeded $5,000,000 (R. 100) and its share of the market was between 30 and 32 per cent (R. 188).

In 1960 the Federal Trade Commission issued a complaint charging that Purolator had discriminated in price between competing purchasers of its replacement filters, in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a) (R. 1–5). The basic facts were stipulated (R. 98–125), and are not in dispute here.

Purolator sells its filters only to warehouse distributors. Warehouse distributors resell substantial quantities of filters to jobbers, to dealers and to fleets. Jobbers resell to dealers and to fleets, and dealers resell only to automobile owners (R. 100).

For pricing purposes, as will be seen later, Puro-

lator distinguishes between warehouse distributors with single warehouses and those with "branch locations" or "branch warehouses." In this connection a clarification of terms is necessary. It was stipulated that warehouse distributors resell filters "either from a central warehouse location or through branch locations, called by respondent 'jobber branches,' which are owned and controlled by, or which own or control, the warehouse distributor * * *" (R. 100). Throughout this proceeding, until Purolator filed its brief in the court of appeals, all parties concerned, including Purolator, understood that the branches were in fact "branch warehouses" or "branch locations."[2] In its brief in the court of appeals, and in its petition here, petitioner referred throughout to these branches as "affiliated jobbers," and the court of appeals also used that term. The nomenclature used, however, is of little consequence because branches of warehouse distributors, like central warehouses and warehouse distributors without branches, all resell substantial numbers of filters to jobbers, to dealers, and to fleets (R. 100, 122). We refer to these branches in the terms that we believe accurately describe their functions, *i.e.*, "branch warehouses" or "branch locations."

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[2] See, *e.g.*, stipulation, R. 100, 102, 107, 109, 110, 111; Commission Exhibits 1 (R. 824), 2 (R. 831), 15 (R. 865–867) (documents prepared by petitioner in its regular course of business); questions posed by Purolator's counsel to witnesses, R. 143, 225, 226, 238, 239, 250–252, 356, 358, 413, 439, 494, 495, 520; majority opinion of the Commission, R. 40, 41, 43, 44, 72; dissenting opinion of Commissioner Elman, R. 75, 76; petition for review, R. 80, 81, 83.

It was stipulated that warehouse distributors without branches compete with the central and branch locations of warehouse distributors with branches in sales to jobbers, dealers and fleets. It was also stipulated that jobbers compete with warehouse distributors without branches and with the central and branch locations of warehouse distributors with branches in sales to dealers and fleets. It was stipulated that this competition is substantial (R. 101–102).[3]

Purolator suggests resale prices of its filters at all levels of distribution (R. 119), and it was stipulated that as a general rule "warehouse distributors, jobbers and dealers sell at the resale prices suggested by [Purolator]" (R. 120). In carrying out its policy of maintaining suggested resale prices the majority of the warehouse distributors are required, before becoming eligible for certain discounts on sales to jobbers, to submit monthly reports showing sales based on Purolator's suggested resale prices to jobbers. The records of warehouse distributors that do not make

[3] Warehouse distributors and jobbers stock a large variety of automobile replacement parts. It was stipulated that warehouse distributors "carry large inventories of such parts, very often numbering from 20,000 to 45,000 different items and jobbers carry somewhat smaller inventories, usually 5,000 different items" (R. 123).

It was also stipulated that many warehouse distributors with branches resell a "substantial portion" of Purolator's filters "to dealers, either through their central warehouse location or through such branch locations" (R. 100). And Purolator's Assistant General Sales Manager conceded that the "vast bulk" of the warehouse distributors with branches "sell to both jobbers and dealers" (R. 554–555).

monthly reports are subject to periodic checks by respondent's auditors (R. 119). Respondent maintains a staff of about 80 employees, referred to as "jobber salesmen," who take orders for respondent's filters from jobbers for transmittal to warehouse distributors. These field men "frequently make attempts to encourage adherence to respondent's published suggested resale prices by direct, personal verbal contact with the jobber or dealer reselling at less than those suggested prices" (R. 120).

Petitioner's price structure is complex, and can best be described, as has been done throughout this proceeding, by relating discounts to a filter which a dealer sells to the automobile owner for $1.00. On such a filter the dealer receives a discount of 45 per cent from the retail price, and pays his supplier, whether a jobber or a warehouse distributor with or without branches, 55 cents for the filter ($1.00 —45% of $1.00). Jobbers and fleets receive a discount of 60 percent from the retail price, and pay the warehouse distributor with or without branches 40 cents for the filter ($1.00 —60% of $1.00) (R. 103). All discounts to warehouse distributors are taken from the 40 cents price the jobber pays, and are as follows:

(1) All warehouse distributors with or without branches receive initially from Purolator a 5 percent discount from the jobber price. This is the only discount received by warehouse distributors without branches on filters resold to dealers, which results in

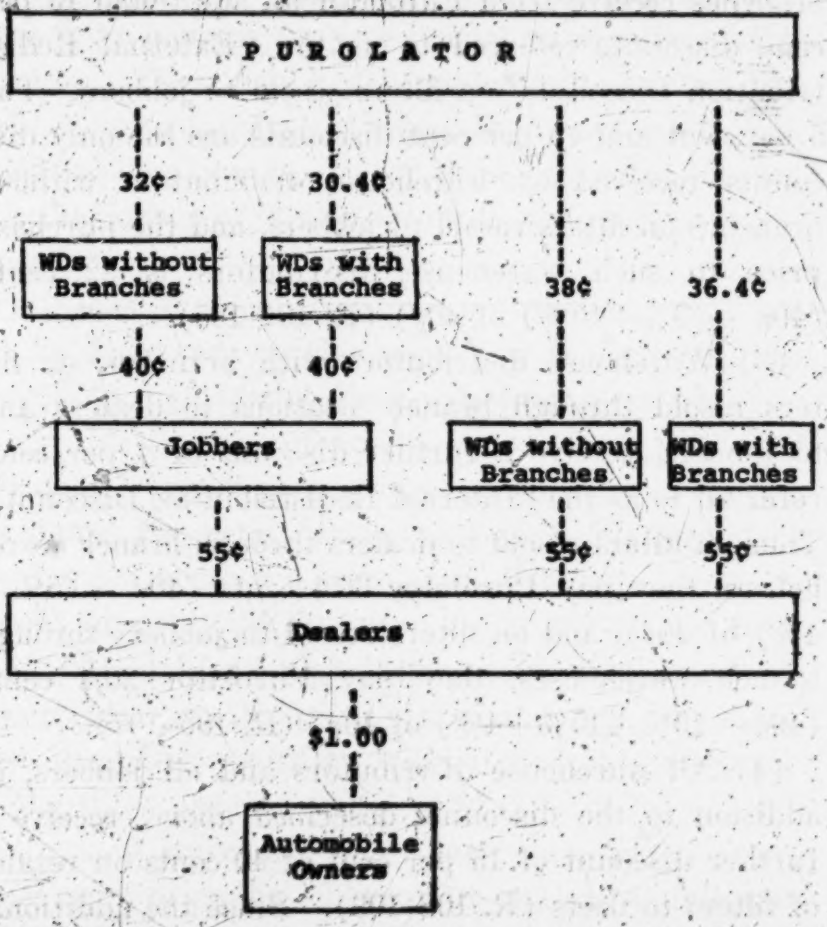
a purchase price to such warehouse distributors of 38 cents (40¢ —5% of 40¢) (R. 103–104).

(2) All warehouse distributors with or without branches receive from Purolator an additional 15 per cent discount, referred to as the "External Redistribution Discount," on filters resold to jobbers. The 5 per cent and 15 per cent discounts are the only discounts received by warehouse distributors without branches on filters resold to jobbers, and the purchase price to such warehouse distributors is 32 cents (40¢ —(5%+15%) of 40¢) (R. 104–105).

(3) Warehouse distributors with branches, on filters resold through branch locations to dealers and to jobbers, receive a further discount of 4 per cent, referred to as the "Internal Redistribution Discount." Thus on filters resold to dealers through branch warehouses, they pay Purolator 36.4 cents (40¢ —(5%+4%) of 40¢), and on filters resold to jobbers through branch warehouses, they pay Purolator 30.4 cents (40¢ —(5%+15%+4%) of 40¢) (R. 106–107).

(4) All warehouse distributors and all jobbers, in addition to the discounts described above, receive a further discount of 15 per cent of 40 cents on resales of filters to fleets (R. 108–109). Since the additional discount is the same (15 per cent in both cases) no issue is raised by resales to fleets that is not raised by resales to dealers, and fleets will not be discussed further in this brief.

The following chart shows graphically the differences in price paid for Purolator's filters by competing purchasers, with the exception of sales to fleets:



The Commission found[4] that the above-described differences in price charged by Purolator to purchasers competing in the resale of filters at the same

[4] At the time of the Commission's decision, April 3, 1964, there was a vacancy on the Commission. Commissioner Dixon wrote the majority opinion, which was concurred in by Commissioner MacIntyre (R. 39–72). Commissioner Elman dissented (R. 73–77), and Commissioner Reilly did not participate (R. 70). See n. 9, *infra*, p. 22.

levels of distribution constituted price discriminations within the meaning of the Act (R. 44–45). It found that because of high costs and low profit margins (3 to 4 per cent), the discriminations were neither "insignificant," "trivial" nor *"de minimis,"* and that their effect "may be substantially to injure competition" (R. 45–50). The discriminations found to be illegal under the above facts are as follows:

(1) *Discriminations between warehouse distributors without branches and warehouse distributors with branches on filters resold to jobbers and dealers.* Warehouse distributors with branches, on filters resold to jobbers through branch outlets for 40 cents, pay 30.4 cents, while warehouse distributors without branches pay 32 cents for the same filters similarly resold. The discrimination in favor of warehouse distributors with branches is 1.6 cents, 5 percent of the price paid by warehouse distributors without branches (5% of 32¢=1.6¢). Where warehouse distributors function as jobbers in reselling to dealers for 55 cents, those selling through branch warehouses pay 36.4 cents while those without branches pay 38 cents, resulting, again, in a discount of 1.6 cents in favor of warehouse distributors with branches, about 4.2 percent of the price paid by warehouse distributors without branches (4.2% of 38¢=1.6¢).

The Commission held that the cost of redistributing filters from the central warehouse to branch warehouses was irrelevant to the question of injury caused by these discriminations in price, and that proof of such costs could not serve to rebut the *prima facie* showing of adverse competitive effects (R. 50–

52). (Noting that "warehouse distributors who maintain a central warehouse and reship to branches operate in this manner for reasons of efficiency, convenience, and economy" (R. 51), the Commission held that the discriminations in price are not "excused by proof that the buyer receiving the more favorable price has higher internal expenses than his competitor" (R. 52).

(2) *Discriminations between jobbers and warehouse distributors with and without branches on filters resold to dealers.* As stated, warehouse distributors with branches, on filters resold to dealers through branch outlets, pay Purolator 36.4 cents, and warehouse distributors without branches pay Purolator 38 cents. Jobbers pay 40 cents to their suppliers for such filters, which they resell to dealers in competition with such warehouse distributors for 55 cents. This results in discriminations in favor of warehouse distributors of 3.6 cents and 2 cents, respectively, which amounts to 9 percent and 5 percent of the price paid by jobbers (9% of 40¢=3.6¢; 5% of 40¢=2¢).

In connection with the discriminations between warehouse distributors and jobbers, the Commission held that jobbers, although they are customers of warehouse distributors, are "purchasers" from Purolator within the meaning of Section 2(a). In so holding it applied the "indirect purchaser" doctrine enunciated by the Commission, and approved by the courts, in many prior cases (R. 53–56). The Commission made detailed findings as to the control exercised by Purolator over the prices to jobbers, and over other terms and conditions of sale under which

jobbers purchase from warehouse distributors. It discussed the many "direct contacts" between Purolator and jobbers (R. 56–62). It concluded that Purolator exercised "control over the distributor-jobber relationship to such an extent that the jobbers effectively were [Purolator's] customers rather than the distributors' and, for the purpose of the Robinson-Patman Act, [Purolator] is thus chargeable with the competitive effects of distributors' prices to jobbers" (R. 62).

The Commission rejected Purolator's contention that the price differentials between warehouse distributors and jobbers on filters resold to dealers were cost justified under the proviso of Section 2(a), by reason of the fact that Purolator charged warehouse distributors reselling to jobbers 6 cents less per filter than it charged warehouse distributors who compete with jobbers in reselling to dealers. The Commission noted that Purolator offered no evidence as to higher costs incurred in "manufacturing, selling, and delivering" filters to warehouse distributors for resale directly to dealers, and held that Purolator had not met its burden of proving a valid cost justification defense by showing only the differences in prices which it "chooses to charge" distributors (R. 62–64).

In addition to the contested violations of Section 2(a) found by the Commission and discussed above, Purolator stipulated that it had violated the Act by discriminating in favor of one warehouse distributor, designated in the stipulation as "warehouse distributor A." This warehouse distributor was granted the full external redistribution discount (15 per cent) on filters it resold directly to dealers. It paid 32 cents

for filters resold to dealers while competing warehouse distributors paid 38 cents and jobbers paid 40 cents for filters similarly resold. It was stipulated that this discrimination had the adverse effects on competition proscribed by the statute, and it was conceded that an appropriate order to cease and desist could be entered (R. 110–113). Thus, the issues raised by the petition can only affect the question of whether the Commission's cease and desist order properly includes a prohibition against the discriminations challenged in this Court.

The court of appeals held that all of the Commission's findings of fact were supported by substantial evidence, and affirmed the Commission's decision in its entirety. The questions raised by the petition relate to (1) whether the 4 per cent internal redistribution discount granted warehouse distributors on sales through branch warehouses has the probable effect of injuring competition, (2) whether jobbers are purchasers from Purolator within the meaning of Section 2(a) of the Clayton Act, and (3) whether the lower price paid by warehouse distributors on resales to dealers in competition with jobbers was shown to be cost justified within the meaning of the proviso of Section 2(a).

ARGUMENT

1. On the basis of the record the Commission found that the business of selling automobile replacement parts at all levels of distribution is "keenly competitive," and is characterized by "relatively high costs" resulting in net profit margins of "between

3% and 4%" (R. 45). It found that the price discriminations practiced by Purolator, the least of which is greater than the normal profit margin, are substantial, and that the "potential effect" of the discriminations on competition is revealed by the fact that the 2 per cent cash discount prevalent in the industry "is considered by warehouse distributors and jobbers alike to be important and even essential to a profitable business" (R. 48). On the basis of these facts the Commission concluded that "a prima facie case of competitive injury" had been shown, and that the effect of the discriminations "may be substantially to injure competition" (R. 49). The court of appeals agreed.

These findings of adverse competitive effects do not result from the application of a "mechanical formula" or from "push button" enforcement, as contended by Purolator (Petition, 13–14); they derive from the exercise of common sense. Potential injury frequently and with sound reason has been inferred from substantial price discriminations practiced in keenly competitive markets characterized by narrow profit margins. See, *e.g.*, *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152, 154–155 (C.A. 7), *certiorari denied*, 355 U.S. 941; *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253, 254–255 (C.A. 7), *certiorari denied*, 353 U.S. 938. And no further evidence of injury is necessary, for "[i]t would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely that

there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 50–51.

Purolator contends, however, that warehouse distributors without branches were not injured by the 4 per cent internal redistribution discount granted warehouse distributors with branches on filters resold through branch outlets (Petition, 9–12). It offered in evidence cost studies showing that the cost to warehouse distributors of redistributing filters to their branch outlets was in excess of the 4 per cent price advantage they received. This evidence was not designed to present a cost justification defense, permitted by the proviso to Section 2(a), but was intended to negate the *prima facie* showing of injury to warehouse distributors without branch warehouses.

The hearing examiner (R. 32–33), the Commission (R. 50–52), and the court of appeals (Petition, Appendix B, 12a–13a) rejected this evidence as being irrelevant to the issue of competitive injury.[5] This

[5] Purolator contends (Petition, 14–15) that the rejection of this evidence constituted a denial of a fair hearing, the theory being that if customers' costs are relevant to show competitive injury they are also relevant to show a lack of competitive injury. But, as shown, the Commission's findings of adverse effects on competition rested on stipulated facts that the business of distributing automobile parts is keenly competitive, that costs of doing business are relatively high, and that profit margins are very low. The offered evidence could not possibly

ruling plainly was correct. Warehouse distributors without branches and warehouse distributors maintaining branch warehouses perform exactly the same distributive functions; they compete in the sale of filters to jobbers, to dealers and to fleets. The Commission found that warehouse distributors who sell through branch outlets do so "for reasons of efficiency, convenience, and economy," and that "warehouse distributors who operate branches and reship would not cease to operate in this manner even if [Purolator's] four percent internal redistribution discount were discontinued" (R. 51). The Commission clearly was justified in concluding that Purolator's 4 per cent discriminatory price may not "be excused by proof that the buyer receiving the more favorable price has higher internal expenses than his competitor" (R. 52). As the court of appeals held (Petition, Appendix B, 13a):

> Companies competing in the same line may experience different costs, and if those costs are a result of the company's method of operation, evidence that a seller helped some of its customers defray those costs while it did not help others is not relevant to disprove competitive injury. Such evidence only tends to show that some WDs have costs peculiar to their manner of doing business; it does not show nor could

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rebut these facts; it would show only that some customers, because of their method of selling, had costs not incurred by others. As the court of appeals held, the Commission's evidence "clearly goes to the question of competitive injury," while Purolator's offered evidence was not of "the same type * * *" (Petition, Appendix B, 13a).

it show that competitors of these WDs would not be injured if some of those costs are paid by Purolator.

Moreover, even if the advantages of the 4 per cent discriminatory discount are more than offset by the costs of transacting business through branch warehouses, injury is still apparent. If internal redistribution is an inefficient method of operation, the more efficient warehouse distributors are entitled to the benefits of their business acumen; they should not be required to compete against the subsidization of inefficiency. The injury caused by the price discrimination would be the same as if the favored and non-favored warehouse distributors were equally efficient.

2. Warehouse distributors and jobbers, as shown, perform the identical functions of stocking and selling filters to dealers at the same price. Warehouse distributors purchase directly from Purolator, while jobbers purchase from warehouse distributors. The Commission held that because of the control Purolator exercises over the prices and terms at which jobbers purchase filters, jobbers are "purchasers" from Purolator within the meaning of Section 2(a). The court of appeals affirmed, holding that the long-established "indirect purchaser" doctrine is sound in the factual setting here. It stated the rule as follows (Petition, Appendix B, 16a):

> If a seller can control the terms upon which a buyer once removed may purchase the seller's product from the seller's immediate buyer, the buyer once removed is for all practical, economic purposes dealing directly with the seller.

> If the seller controls the sale, he is responsible for the discrimination in the sales price, if there is such discrimination. If the seller cannot in some manner control the sale between his immediate buyer and a buyer once removed, then he has no power by his own action to prevent an injury to competition.

The Commission first applied the indirect purchaser doctrine in 1937, one year after the enactment of the Robinson-Patman Act, in *Kraft-Phenix Cheese Corporation*, 25 F.T.C. 537, 546, where it held:

> A retailer who purchases respondent's goods from jobbers and wholesalers is considered by the Commission to be a "purchaser" within the meaning of the Robinson-Patman Act as well as retailers buying direct. This is because of the fact that respondent recognizes the retailers buying through jobbers as customers by personally soliciting them and by making effective its price policies and schedules as applied to them. A retailer is none the less a purchaser because he buys indirectly if, as here, the manufacturer deals with him directly in promoting the sale of his products and exercises control over the terms upon which he buys.

The Commission has never deviated from this interpretation of the statute, and has applied the indirect purchaser doctrine, where the facts warrant, in many cases.* Surely, this "consistent administrative con-

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*See, *e.g.*, *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537; *Luzor, Ltd.*, 31 F.T.C. 658; *Dentists' Supply Co.*, 37 F.T.C. 345, *Champion Spark Plug Co.*, 50 F.T.C. 30; *General Motors Corp.*, 50 F.T.C. 54; *E. Edelmann & Co.*, 51 F.T.C. 978, *affirmed*, 239 F. 2d 152 (C.A. 7), *certiorari denied*, 355 U.S. 941.

struction" of a statute committed by Congress to the jurisdiction of the Commission for enforcement "is entitled to great weight." *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 391. Moreover, the courts consistently have sustained the Commission's application of the doctrine in several cases. *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104, 109–110 (C.A. 2), *certiorari denied*, 371 U.S. 824; *Elizabeth Arden, Inc.* v. *Federal Trade Commission*, 156 F. 2d 132, 135 (C.A. 2), *certiorari denied*, 331 U.S. 806. *Cf, Monroe Auto Equipment Company* v. *Federal Trade Commission*, 347 F. 2d 401, 403–404 (C.A. 7), *certiorari denied*, 382 U.S. 1009; *K. S. Corp.* v. *Chemstrand Corp.*, 198 F. Supp. 310, 312 (S.D. N.Y.). In *American News* the Second Circuit concisely stated the rule (300 F. 2d at 109):

> If the manufacturer deals with a retailer through the intermediary of wholesalers, dealers, or jobbers, the retailer may nevertheless be a "customer" or "purchaser" of the manufacturer if the latter deals directly with the retailers and controls the terms upon which he buys.

The facts here fall squarely within the rule approved in the above decisions. The Commission discussed in detail the relationship between Purolator and jobbers (R. 56–62). It found that Purolator controls the prices at which jobbers purchase from warehouse distributors (R. 58); that it requires warehouse distributors to enter into contracts with jobbers, prepared and approved by Purolator (R. 61), under which jobbers must agree to maintain a $500 inven-

tory of Purolator's products (R. 56) and to purchase their entire requirements from the warehouse distributor with whom the jobber signs the contract (R. 57); that in order to be entitled to the external redistribution discount, warehouse distributors must either make monthly reports showing sales to jobbers at suggested prices or subject their records to inspection by Purolator in order to verify sales volume representations (R. 58); that Purolator polices resale prices at all levels (R. 60); that its salesmen solicit orders directly from jobbers and turn them over to warehouse distributors for processing (R. 62); that Purolator "dropped shipped" filters to jobbers at the request of warehouse distributors (R. 62); that it mailed directly to the jobbers price lists and advertising materials (R. 62). In short, the Commission concluded that "the evidence reveals that [Purolator] has, in effect, established the prices at which the jobbers purchase from the warehouse distributors and controls the terms under which the purchases are consummated" (R. 62).

Thus Purolator is directly responsible for the disadvantageous prices at which jobbers must purchase and for the adverse effect of the discriminations on jobber competition with warehouse distributors. Under the consistent administrative precedent and the judicial authority cited above, jobbers are "purchasers" from Purolator for the purposes of Section 2(a) of the Clayton Act.

3. Purolator contended before the Commission and the court of appeals that the lower prices paid by

warehouse distributors for filters resold to dealers (38 cents and 36.4 cents) as compared with the price paid by jobbers for such filters (40 cents), resulting in discriminations in favor of warehouse distributors of 2 cents and 3.6 cents, were more than justified by differences in costs of sale. The argument was that because Purolator charged warehouse distributors 6 cents less for filters resold to jobbers than it charged warehouse distributors for filters resold to dealers, the 2 cent and 3.6 cent discriminations in prices between warehouse distributors and jobbers were cost justified (see Commission Opinion, R. 62–64). Purolator contended that the different prices it chose to charge, without more, constituted a justification for the differences in price.

In rejecting this strange purported cost justification defense, the Commission noted that Purolator had "offered no evidence on the different costs incurred by it in manufacturing, selling, and delivering" filters to warehouse distributors for sale directly to dealers (R. 64); in other words, no comparative costs were presented on sales to favored and disfavored purchasers. The Commission held that having before it "only evidence of the prices which [Purolator] chooses to charge rather than evidence of the costs incurred," it had "no basis for making a cost comparison" and could not conclude that Purolator's different prices were cost justified (R. 64). The court of appeals affirmed.

Purolator in this Court has deviated from the argument it made below. It now contends (Petition, 19–

21) that warehouse distributors are its "agents" in reselling filters to jobbers, and that the 6 cent internal redistribution discount to such warehouse distributors was in fact a "commission" paid to its "agents." Plainly, however, warehouse distributors are direct purchasers from Purolator.[7] But even if they did act as Purolator's agents in reselling to jobbers, the deficiencies of the cost justification contention would still be apparent because Purolator offered no evidence of its costs of sales to warehouse distributors and to jobbers.[8] The court of appeals correctly evaluated Purolator's cost justification defense, as follows (Petition, Appendix B, 18a):

> Subsection (b) of Section 2 of the Act places the burden of rebutting a prima facie case of price discrimination by showing a justification upon the person charged with violation of the

[7] Contracts executed between Purolator and warehouse distributors are contracts of sale (Commission Exhibits 1, 2, 3, R. 824–839), and numerous officials of purchasing warehouse distributors testified that they are not agents of Purolator (R. 849, 493, 519, 566, 590, 631, 657, 672, 692). If warehouse distributors were Purolator's agents in sales to jobbers, jobbers would be direct purchasers from Purolator instead of "indirect purchasers."

[8] *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, and *Thomasville Chair Company* v. *Federal Trade Commission*, 306 F. 2d 541 (C.A. 5), have no bearing on this case. Each of those cases arose under Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(c), and the question in each was whether illegal brokerage, or allowances in lieu thereof, had been passed on to the buyer. The question here is whether Purolator has discriminated in price within the meaning of Section 2(a), and, if it has, whether it has presented a valid cost justification defense on this phase of the case.

section. Although Purolator had the opportunity at the hearing before Commission of offering evidence as to its difference in costs of manufacture, sale, or delivery to different purchasers as contemplated by the Act, it failed to do so. Instead, it offered only evidence of its prices.

CONCLUSION

The decision of the court of appeals is correct. There is no conflict among the circuits, and the decision below accords with the pertinent administrative and judicial precedents. There is accordingly no occasion for further review. The petition for a writ of certiorari should be denied.[9]

Respectfully submitted.

JAMES McI. HENDERSON,
General Counsel.

J. B. TRULY,
Assistant General Counsel.

CHARLES C. MOORE, JR.,
Attorney.

I authorize the filing of the foregoing brief in opposition. I shall shortly file a memorandum setting forth the views of the United States in this case.

THURGOOD MARSHALL,
Solicitor General.

JULY 1966

[9] On April 1, 1966, Purolator filed a motion in this Court for leave to amend its petition for a writ of certiorari in order to raise the question of whether the Commission's decision was invalid because it was issued by less than a majority of the authorized members of the Commission. As stated (*supra*, n. 4), only three Commissioners (a quorum under the Commission's rule, 16 C.F.R. 1.7), participated in the decision and

the vote was 2 to 1. Purolator's motion relies primarily on the Ninth Circuit's decision in *Flotill Products, Inc.* v. *Federal Trade Commission*, 358 F. 2d 224 (decided March 16, 1966, printed as an apppendix to Purolator's motion, 1a–18a), which held that the Commission can act only through a majority of its authorized members, and on the conflict between the decision of the Ninth Circuit in *Flotill Products* and the decision of the Sixth Circuit in *Atlantic Refining Company* v. *Federal Trade Commission*, 344 F. 2d 599, 607, *certiorari denied*, 382 U.S. 939. Purolator did not raise this question below.

On June 20, 1966, the Court of Appeals for the Ninth Circuit granted the Commission's petition for rehearing in *Flotill Products*, and has set argument for August 2, 1966, before the court sitting *en banc*. Thus there is no outstanding conflict between the circuits.

The identical question has been raised and is now pending in two other courts of appeals, *Luria Brothers and Company* and 14 related cases (C.A. 3, No. 14,402, argued January 21, 1966), and *Emile M. Lapeyre, et al.* (C.A. 5, No. 21,787, argued April 19, 1966). The Commission believes that this question should not be considered in this case, where the point was neither raised before nor decided by the court of appeals. Resolution of the question, if a conflict develops, should await review of a case where it was raised below, such as one of the cases cited above. Purolator's motion to amend its petition to include the question should be denied.

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